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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. BARRY BONDS, Defendant.	No. CR 07-0732-SI **UNITED STATES'S OPPOSITION TO THE DEFENDANT'S MOTION *IN LIMINE* FOUR RE: OPINION TESTIMONY AS TO DEFENDANT'S TRUTHFULNESS IN THE GRAND JURY OR STATE OF MIND (DOCKET #217)** Date: March 1, 2011 Time: 2:00 p.m. Judge: Honorable Susan Illston

INTRODUCTION

The defendant has moved *in limine* to limit Agent Jeff Novitzky's testimony to exclude any references to the agent's assessment of the defendant's truthfulness before the grand jury. The United States has no intention of eliciting testimony from Agent Novitzky or any other witness that is impermissible under the Federal Rules of Evidence. However, Agent Novitzky's testimony regarding the materiality of the defendant's alleged falsehoods to the grand jury is permissible, even if it contains implicit references to Agent Novtizky's assessment of the defendant's statements. The testimony is permissible as lay opinion under Fed. R. Evid. 701 and

704, and should not be excluded under Fed. R. Evid. 403. The United States therefore opposes the defendant's motion *in limine* number four.

ARGUMENT

Agent Novtizky's testimony that specific portions of the defendant's grand jury testimony were material to the grand jury's investigation – *i.e.,* the defendant's testimony was relevant to any issue under consideration by the grand jury and had a "natural tendency to influence the grand jury's investigation" – is admissible.

I. The Federal Rules of Evidence broadly permit opinion testimony, even when it embraces ultimate issues of fact to be decided by the jury

Under Fed. R. Evid. 701, a witness who is not testifying as an expert may provide the jury with "opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness'[s] testimony or the other determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge" requiring expert testimony. Fed. R. Evid. 701. A witness qualified as an expert may provide opinion testimony if the testimony is (1) based upon sufficient facts or data, (2) the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case, so long as the expert does not state an opinion as to whether the defendant had the mental state or condition necessary to be convicted of the charged offense. Fed. R. Evid. 702, 704(b). Opinion or inference testimony from any witness, whether expert or lay, is specifically "not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a).

II. The Ninth Circuit explicitly sanctions government witness lay testimony regarding the materiality of false statements under Fed. R. Evid. 701

Materiality is an element of all five charges the defendant faces at trial. *United States v. Thomas*, 612 F.3d 1107, 1114, 1125 (9th Cir. 2010) (noting that materiality of statement is element of 18 U.S.C. §§ 1503 and 1623(a)). The Ninth Circuit has squarely held that under the Federal Rules of Evidence, government witness may provide lay opinion or inference testimony regarding the materiality of false statements. *United States v. Matsumaru*, 244 F.3d 1092, 1102 (9th Cir. 2001) ("'Government witnesses are permitted . . . to testify as to whether certain truths,

if known, would have influenced their decisionmaking . . . .'" (quoting *United States v. Kingston*, 971 F.2d 481, 486 (10th Cir. 1992)). In *Matsumaru*, the prosecution called an immigration officer and a State Department official, neither of whom had been involved in processing the visa applications prepared by the defendant, to establish that misstatements made in the visa petitions were material. *Id.* at 1101. During direct examination, each witness was asked to review the visa petitions along with supporting materials, and then asked whether knowing certain facts would have affected the witness's decision to grant or deny the petition. *Id.* at 1101-02. The Ninth Circuit held this "type of lay testimony" was "entirely proper." *Id.* at 1102. There was no requirement that the witnesses be qualified as experts, and the fact that the witnesses reviewed the visa petitions before stating their opinions to the jury made their opinions rationally based on the perception of the documents. *Id.*

III. Agent Novitzky may testify regarding the materiality of the defendant's statements to the grand jury, so long as he does not give any legal conclusions

Likewise, the United States may offer Agent Novtizky's lay opinion or inference testimony to establish that the defendant's false statements to the grand jury were material. Of course, the government may not ask questions calling for a witness to give a legal conclusion and Agent Novtizky may not testify as to the legal definition of materiality or opine as to the defendant's guilt. *See United States v. Crawford*, 239 F.3d 1086 (9th Cir. 2001); *United States v. Moran*, 493 F.3d 1002, 1009 (9th Cir. 2007). It is the exclusive role of the Court to instruct the jury as to the applicable law. *Moran*, 493 F.3d at 1008. However, Agent Novitzky may "testify to *facts* that the jurors could accept or reject in reaching their conclusion as to whether [the defendant's] statements were 'material'" to the government's investigatory strategies. *United States v. Safa*, 484 F.3d 818, 821-22 (6th Cir. 2007) (original emphasis) (permitting prosecutor to ask Assistant United States Attorney witness whether defendant's answers, if false, would have influenced, impeded, or dissuaded grand jury's investigation, and if true, would have assisted grand jury's investigation).

Although there is no requirement that a lay witness have specialized knowledge unavailable to the jury on which he may form his opinion, *United States v. Henderson*, 68 F.3d 323, 326 (9th Cir. 1995) (rejecting contention that lay witness identification impermissible unless

witness has specialized knowledge of defendant' appearance unavailable to jury), Agent Novitzky in fact was the lead agent in the Balco investigation. As such, he had a central role in directing the grand jury investigation. He may testify that the defendant's grand jury testimony did or was capable of influencing the grand jury investigation. His factual and opinion testimony is relevant to the question whether the defendant's testimony was material, and it is admissible.

IV. Agent Novitzky's testimony on materiality may refer to his view of the defendant's statements to the grand jury as inconsistent with other evidence and untruthful

The United States does not intend to elicit testimony about whether Agent Novitzky believes the defendant's grand jury testimony was truthful. However, Agent Novitzky's view of the defendant's truthfulness to the grand jury may be implicit in his testimony regarding materiality. The government should not be required to excise any such opinions out of Agent Novtizky's testimony, as requested by the defendant. *See* Def. Mot. *In Limine* Four at 4 (asking that Agent Novtizky be precluded from testifying as to how "truthful" answers would have affected grand jury decisions, testifying that other evidence "contradicted," "disproved").

In *Thomas*, the Ninth Circuit found that the government had provided sufficient evidence that Tammy Thomas's false statements to the grand jury were material because "[h]ad Thomas truthfully testified that she had received" steroid products from Patrick Arnold, the grand jury "could have inquired into the specifics of these products." 612 F.3d at 1123. "Had the grand jury heard truthful testimony from Thomas, it might have been able to connect Arnold to BALCO." *Id.* The Ninth Circuit's finding was clearly based on Agent Novitzky's trial testimony that the credibility of seized documents and other witness testimony was called into question because Thomas's statements were "inconsistent" with other evidence, and her inconsistent testimony delayed agents' ability to connect Patrick Arnold to the Balco conspiracy.[1] *See* Exhs. A and B.

In *United States v. Ahmed*, 472 F.3d 427, 433-34 (6th Cir. 2006), the defendant was charged with making a false statement on his government employment questionnaire. The

[1] Thomas did not argue on appeal that Agent Novitzky's characterization of her testimony as "inconsistent" with other evidence was improper.

prosecution called an assistant director in the personnel security division for the employer to provide evidence regarding the materiality of the allegedly false statements. *Id.* The witness testified that the defendant's answers appeared dishonest and this conclusion influenced the determination that the defendant was unsuitable for employment. *Id.* The Sixth Circuit held that this testimony was admissible under Fed. R. Evid. 701's three criteria. *Id.* The witness was directly involved in the determination of the defendant's suitability for continued employment and testified based on her personal knowledge. *Id.* It was helpful to the determination of a fact in issue because the testimony was elicited to prove that the defendant's answers were material. *Id.* And, the testimony was not based on any kind of specialized knowledge. *Id.* The Sixth Circuit also specifically held that the witness's testimony that the defendant had answered falsely was not testimony containing a legal conclusion. *Id.* Although falsity was an element of the offense, the term "false" is also a vernacular term and there was no suggestion that the witness used the term in any other sense. *Id.*

These cases show that Agent Novitzky's view that certain of the defendant's grand jury statements were "inconsistent" with other evidence is admissible to the extent that it is integral to his testimony regarding materiality – *i.e.,* he made particular investigative decisions based on his view that the defendant's grand jury was not truthful. For example, Agent Novitzky may testify that because he viewed the defendant's grand jury statements as inconsistent with other athletes' testimony, he had to consider further investigation to support the credibility of the other athletes. Agent Novitzky could not testify about how the defendant's statements caused him to alter the investigation without some allusion to his view of it as untrustworthy. Similarly, Agent Novtizky may testify that his belief that the defendant's testimony that he did not knowingly receive steroids in exchange for promoting Balco products was false, caused Agent Novitzky to develop other potential investigative avenues for exploring potential money laundering charges. Again, he could not give this testimony without some allusion to his view of the reliablity of the defendant's testimony.

Such testimony, revealing Agent Novitzky's views on whether the defendant was truthful in his grand jury testimony, meets the three criteria for admission under Fed. R. Evid. 701. First,

Agent Novitzky's assessment of the defendant's grand jury testimony is based on his personal perceptions of the evidence and grand jury transcript as the lead investigative agent. *See Matsumaru*, 244 F.3d at 1102. Second, although it is not helpful to the determination of whether the defendant in fact lied in his grand jury testimony, Agent Novitzky's testimony is helpful to a clear understanding of his testimony regarding why he directed the grand jury's investigation in the particular way he did, and his view that the defendant's false answers were capable of influencing the investigation. *See United States v. Henke*, 222 F.3d 633, 643 (9th Cir. 2000) (per curiam) (finding lay opinion should not have been admitted under Fed. R. Evid. 701 because it was based on less information than jury had available to it, and so was not helpful in determining whether defendant knew about revenue scheme). Third, it is based only on his role in the investigation, not expert knowledge.

Agent Novitzky's assessment of the truthfulness of the defendant's grand jury testimony may also embrace ultimate issues of fact. *See United States v. Langford*, 802 F.2d 1176, 1179 (9th Cir. 1986) (holding that "[o]pinion testimony on ultimate issues of fact is admissible unless the testimony concerns the mental state or condition of a defendant in a criminal case" by expert). The numerous cases the defendant cites in his motion *in limine* are not to the contrary. *See* Def. Mot. *In Limine* Four at 2-3. These cases all essentially state that one witness may not be compelled to testify about the credibility of another witness, whether by giving an opinion on the truthfulness of the witness's trial testimony or in some extra-judicial interview, because it is the jury's "responsibility to determine credibility by assessing the witnesses and witness testimony in light of their own experience." *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985), *overruled in part on other grounds*, *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997) (en banc) (holding that expert does not violate Fed. R. Evid. 704(b) by testifying to predicate matter that might permit jury to infer necessary mens rea, so long as testimony as to predicate matter does not necessarily imply mens rea element); *see United States v. Sanchez*, 176 F.3d 1214, 1221 (9th Cir. 1999) (finding prosecutor should not have elicited testimony from officer opining that defendant, who testified at trial, had lied in interview); *United States v. Sanchez-Lima*, 161 F.3d 545, 548 (9th Cir. 1998) (finding that district court should have precluded one agent from

testifying that, based on his training and experience, another agent, who had testified at trial and was accused by defendant of lying, had told the truth in post-incident interview). These cases do not apply here. If the defendant testifies, Agent Novitzky will not testify about the credibility of defendant's trial testimony, only about whether the truthfulness or falsity of his grand jury testimony was material.

Moreover, Agent Novtizky's testimony should not be excluded or curtailed under Fed. R. Evid. 403. As the lead agent in the grand jury's investigation that called for the defendant's evidence, Agent Novitzky's testimony is uniquely probative on the issue of whether the defendant's grand jury statements were material. *See Henderson*, 68 F.3d at 327 (holding that where only identification evidence is officer's lay opinion testimony, district court does not abuse its discretion in determining that probative value of evidence outweighs prejudicial effect of police officer giving opinion). It is true that a statement is material so long as it is relevant to any subsidiary issue under consideration, and the government "need not prove that" the allegedly false "testimony actually influenced the relevant decision-making body." *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003) (internal quotation and citation omitted). But that does not mean that evidence that the statements at issue did actually influence the investigation is not highly relevant to the question of materiality.

There is little danger that Agent Novitzky's opinions as to the veracity of the defendant's grand jury statement will unfairly prejudice the defendant. The simple fact is that Agent Novitzky, after learning of the defendant's grand jury testimony, was the main instrument for the collection of contradictory evidence. Allowing Agent Novitzky to explain his thoughts shows that the continued investigation was based upon evidence and not impermissible personal motives.

The defendant will have ample opportunity to cross-examine Agent Novitzky and will be able to argue that the evidence shows that his grand jury testimony was not knowingly false. The jury will undoubtedly be instructed that it must ultimately decide whether the elements of the charged offenses have been met, and that Agent Novitzky's subjective determination of the falsity of the defendant's statements should not be substituted for their own judgement. This

Court may also make any other limiting instructions it deems appropriate.

V. The United States may present evidence that the defendant knew or must have known thathe was using steroids

The defendant argues that the government is prohibited from offering any testimony that the defendant knew or must have known that he was using steroids.[2] His argument overreaches.

Under Fed. R. Evid. 704(b), expert testimony that a defendant had the requisite mental condition constituting an element of the crime charged or of a defense thereto is inadmissible. This limitation exists only as to expert testimony, not to lay opinion. *See Langford*, 802 F.2d at 1179 (rejecting defendant's objection to opinion testimony on ultimate issues of fact since testimony was not given by expert); *see also United States v. Rea*, 958 F.2d 1206, 1214 (2d Cir. 1992) ("The contention that Sarowitz's opinion as to Rea's knowledge should have been excluded from evidence as a matter of principle, on the ground that the state of Rea's knowledge was an ultimate issue in the case, is untenable.").

However, lay opinion going to a defendant's mental state or condition is only admissible if it meets the criteria under Fed. R. Evid. 701 of (a) being rationally based on the perception of the witness, (b) being helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on specialized, expert knowledge. Fed. R. Evid. 701. The second criteria, that the opinion be "helpful," will usually not be met where the witness fully describes what he or she was in a position to observe, such that the jury is in as good a position as the witness to draw the inference or opinion. *Rea*, 958 F.2d at 1216. However, lay opinion testimony is often helpful "when the inference of knowledge is to be drawn not from observed events or communications that can be adequately described to the jury, but from such factors as the defendant's history or job experience." *Id.* (citing cases admitting Department of Defense officials' opinions that person with defendant's experience in department

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[2] He also suggests that evidence regarding whether the defendant knew that his testimony was material to the grand jury investigation is inadmissible. *See* Def. Mot. *In Limine* Four at 4. This assumes that the defendant is required to know that his testimony was material. In fact, there is no such requirement. The defendant must know that his testimony was false, he need not know that the false testimony was material. *See* Ninth Circuit Model Jury Instruction 8.137; *United States v. Dunnigan*, 507 U.S. 87, 95 (1993) (discussing elements of perjury); *cf.* Ninth Circuit Model Jury Instruction 8.131.

would know rules forbidding giving certain documents to contractors, and admitting opinion that defendant who ran federally-funded program understood certain federal regulations).

Under these principles, lay opinion from witnesses who personally observed the defendant that the defendant knew that he was using steroids is admissible. For example, the defendant's teammates and trainers may testify their opinion that a person with the defendant's experience in professional sports would know that steroids cause certain unique physiological changes. In addition, witnesses such as the defendant's sexual partners and personal physician were in a position to personally and frequently observe the defendant's physical metamorphosis over the period of time he used steroids, and the jury can never have the same access they did to intimate views of the defendant's body and behavior. This is fundamentally different than the lay opinion testimony that was at issue in *Henke*, 222 F.3d at 641. Such opinion testimony would be helpful to the jury, and not be based on any expert status.

CONCLUSION

For the above-stated reasons, the government respectfully opposes the defendant's motion *in limine* to limit Agent Novtizky's testimony regarding the materiality of the defendant's grand jury testimony.

DATED: February 22, 2011

Respectfully submitted,

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